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No. 81-98

In the Supreme Court of the United States

OCTOBER TERM, 1980

HOWARD R. L. COOK AND GEORGE E. PERRY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the suspension or dismissal of federal employees for distributing to fellow employees defamatory statements about a superior, with reckless disregard for their truth or falsity, violates the employees' statutory right to petition Congress under 5 U.S.C. (Supp. III) 7211.

2. Whether the suspension or dismissal of federal employees for distributing to other employees defamatory statements about a superior, with reckless disregard for their truth or falsity, violates the First Amendment.

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-8a) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 13, 1981. A petition for rehearing was denied on April 17, 1981. The petition for a writ of certiorari was filed on July 16, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

STATEMENT

1. Petitioners George Perry, a former Library of Congress employee, and Howard Cook, a present employee, were disciplined by the Library of Congress for distributing defamatory statements about Dr. Paul Horecky, Perry's superior, in violation of Library of Congress Regulation

(LCR) 2023-1.[1] Petitioners initially made these statements, which alleged that Dr. Horecky had misrepresented his credentials, to the Metropolitan Area Congressional Caucus and subsequently distributed their testimony to fellow employees (Pet. App. 28a-29a).

The Library's Assistant Director of Personnel, pursuant to LCR 2020-3, filed disciplinary proceedings against petitioners and proposed sanctions of a 90-day suspension for Cook and dismissal for Perry (Pet. App. 20a). After providing petitioners with the opportunity to respond to the charges orally and in writing, the Director of Personnel dismissed two of the charges but sustained the other four and upheld the proposed sanctions (*ibid.*). Petitioners exercised their right of appeal under LCR 2020-3, and a hearing officer was designated. The hearing officer, after a full administrative hearing, found that petitioners had distributed false statements regarding Dr. Horecky's academic qualifications to fellow employees and that the statements were distributed with reckless disregard for their truth or falsity, *i.e.*, with "malice" (Pet. App. 29a-36a). The hearing officer recommended that both petitioners be suspended for

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[1]LCR 2023-1 provides in pertinent part (Pet. App. 2a n.1):

Section 2. *Policy*

The maintenance of high standards of honesty, integrity, impartiality, and conduct by staff members is essential to assure the proper performance of the Library's business and the maintenance of confidence of citizens in their Government. The avoidance of misconduct and conflicts of interest on the part of staff members through informed judgment is indispensable to the maintenance of these standards.

Staff members shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct or conduct which adversely reflects on the Library, the Government, or their suitability for employment. The policy of the Library with respect to employee disloyalty, striking or rioting is that encompassed in 5 U.S.C. 7311-7313.

90 days (*id.* at 47a-48a). The Acting Librarian of Congress accepted most of the hearing officer's findings and opinions and accepted the recommendation that petitioner Cook be suspended for 90 days, but he ordered that petitioner Perry be dismissed in light of his previous 90-day suspension two years earlier for other defamatory statements about Dr. Horecky (*id.* at 17a-18a).

2. Petitioners brought this action in the Court of Claims alleging that the adverse personnel actions violated their First Amendment rights and their statutory right to petition Congress under 5 U.S.C. (Supp. III) 7211[2] and that the dismissal of Perry was too harsh a penalty. The Court of Claims, ruling on cross-motions for summary judgment on the basis of an extensive administrative record, held that petitioners had failed to show that their constitutional or statutory rights had been violated. Specifically, the court, applying the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), concluded that petitioners' First Amendment rights had not been violated because their malicious, defamatory statements had disrupted the work environment of the Library. With respect to the statutory claim, the court held that since petitioners were sanctioned for distributing the statements to other Library employees, rather than for communicating with Congress, Section 7211 was inapplicable. "Plaintiffs' *distribution* of that testimony," the court stated, "is not entitled to the protection of 5 U.S.C. § 7211 for the simple reason that the other Library employees and members of the public who were given the statements were not in a position to redress the plaintiffs' grievances" (Pet. App. 6a; emphasis in original). Finally,

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[2]5 U.S.C. (Supp. III) 7211 provides: "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

the court rejected petitioners' claim that Perry's punishment was too severe, holding that it was well within the discretion of the Acting Librarian to order dismissal (*id.* at 7a-8a).

ARGUMENT

The decision of the Court of Claims is correct and does not conflict with any decision of this Court or a court of appeals. Accordingly, further review by this Court is unwarranted.

1. Petitioners contend (Pet. 6-7) that their statutory right to petition Congress collectively was violated by the disciplinary proceedings against them. They argue that this right necessarily encompasses the right to communicate with other employees and hence that they cannot be disciplined for distributing material to fellow employees. This contention is without merit. While federal employees may have a right to communicate their grievances to other employees in an effort to encourage a "collective" petitioning of Congress, such a right plainly does not extend to the malicious, defamatory statements made to fellow employees in this case. "[D]efamations are not petitions, having primarily other objects than redress of whatever grievances plaintiff may have had." *Ruderer* v. *United States*, 412 F. 2d 1285, 1291 (Ct. Cl. 1969). As the Acting Librarian of Congress found, petitioners' singular purpose in distributing their congressional testimony to fellow employees was to damage Dr. Horecky's reputation and "to scoff at the Library's endeavors to put to rest the concerns of these [petitioners]" (Pet. App. 12a).[3]

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[3]Prior to petitioners' actions that led to the disciplinary proceedings against them, they had written letters to Library officials requesting an investigation of Dr. Horecky's qualifications. In response to these letters, the Library's Director of Personnel met with petitioners and apparently initiated a security investigation of Dr. Horecky that exonerated him of the charges (Pet. App. 26a-27a).

Petitioners also contend (Pet. 6) that the "citation of testimony before Members of Congress in an adverse action proceeding is a *per se* violation of 5 U.S.C. § 7211." But petitioners were disciplined for distributing false and malicious statements about Dr. Horecky to fellow employees, not for petitioning Congress (see Pet. App. 6a).[4] Moreover, even if petitioners' statements to Congress were a factor in the Library's decision to discipline them, the record amply demonstrates that they would have been disciplined even had they not transmitted information to Congress; thus, the disciplinary action cannot be overturned as a violation of 5 U.S.C. (Supp. III) 7211. Cf. *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977) (dismissal of public employee motivated substantially by the employee's constitutionally protected conduct will be upheld if the employee would have been discharged for constitutionally permissible reasons).[5]

2. Petitioners contend (Pet. 7-9) that the disciplinary proceedings violated their First Amendment rights. This contention is insubstantial, and the Court of Claims' decision is fully consistent with this Court's decisions in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and *Garrison* v. *Louisiana*, 379 U.S. 64 (1964).

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[4]Indeed, the hearing officer's lengthy list of petitioners' objections to the disciplinary proceedings contains no allegation that their right to petition Congress was abridged (see Pet. App. 23a).

[5]In addition, it is not at all clear that 5 U.S.C. (Supp. III) 7211 protects employees who make defamatory statements to Congress with reckless disregard for their truth or falsity. As the Court of Claims has stated, it "does not appear that the statute confers an unlimited privilege to transmit knowingly false and malicious statements, which of course would be unhelpful to Congress." *Ruderer* v. *United States*, *supra*, 412 F. 2d at 1292.

Pickering involved a local school board's dismissal of a teacher for writing a letter to a newspaper containing false accusations about the board's allocation of school funds between educational and athletic programs. The teacher challenged the dismissal on the ground that it violated his First Amendment right of free expression. This Court summarized the factual posture of that case as follows (391 U.S. at 572-573 (footnote omitted; emphasis added)):

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer *but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.*

The Court overturned the dismissal, holding that "in a case such as this, *absent proof of false statements knowingly or recklessly made by him*, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574 (footnote omitted; emphasis added).

This case presents a factual situation far different from that in *Pickering*. Here, the record shows both that petitioners distributed false statements with reckless disregard for the truth (Pet. App. 4a) and that the distribution of the statements interfered with Perry's relationship with his superior, Dr. Horecky, and with the internal management of the Library (*id.* at 4a-5a).[6] In these circumstances, the

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[6]Petitioners point to the hearing officer's finding that their statements did not seriously harm the Library (Pet. 8). This finding, however, was rejected by both the Acting Director of the Library (Pet. App. 13a) and the Court of Claims (*id.* at 4a-5a), which specifically found that petitioners' conduct did harm the internal management of the Library. Even if the Library could not possibly have been harmed by petitioners'

Court of Claims correctly balanced "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education, supra*, 391 U.S. at 568. The government's interest in promoting the efficiency of public services should be given particular weight in this case, because the defamatory matters communicated by petitioners were of only marginal "public concern." As the hearing officer noted, "[i]n the spectrum of concerns to citizens and public employees, it cannot be said that Horecky's educational degrees, or his representation of those degrees, is of particular moment" (Pet. App. 38a).

In *Garrison* v. *Louisiana, supra*, the Court held that a public official could not be subject to a criminal prosecution for defamation, even for statements directed at his nominal superiors, unless the "actual malice" requirements of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), are met. Here, of course, petitioners have not been prosecuted for their statements. In any event, the Court of Claims specifically found that petitioners acted with reckless disregard for the truth (Pet. App. 4a), and thus even if the *Sullivan* standard applies, the disciplinary action taken against petitioners was justified.[7]

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misconduct, the Court of Claims' decision would still not conflict with *Pickering*. The Court there expressly left open the question "whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment." 391 U.S. at 574 n.6. As noted above, that question is not presented here because petitioners' statements did cause harm to the Library's internal management.

[7]Petitioners also argue (Pet. 9-10) that the decision below conflicts with *Perry* v. *Sindermann*, 408 U.S. 593 (1972), because "[s]ummary judgment affirming the dismissal of a government employee for criticizing his superiors, without full exploration of the constitutional issues, is

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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improper" (Pet. 9). While there can be no doubt that bona fide First Amendment claims deserve plenary judicial consideration, the assertion that the Court of Claims did not fully explore the constitutional issues in this case is totally without merit. In contrast to *Perry*, where the district court granted summary judgment *solely* on the basis of pleadings and three short affidavits, the Court of Claims rendered its decision on the basis of a full administrative record, including a lengthy administrative hearing, and the written findings and conclusions of a hearing officer and the Acting Librarian. In *Perry*, the disposition by summary judgment denied the plaintiff the opportunity to show that his contract was not renewed in retaliation for his exercise of free speech (see 408 U.S. at 598), but here all the relevant facts were brought out at an administrative hearing. The Court of Claims' opinion, which carefully evaluates this case in light of the principles of *Pickering* v. *Board of Education, supra*, belies any contention that the court failed to explore fully the constitutional issues raised by petitioners. Nor can it reasonably be argued that this case was otherwise inappropriate for resolution by summary judgment. Indeed, petitioners themselves filed a motion for summary judgment.

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